Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

October Term, 1996

Brown University, *et al.*,
Petitioners,

v.

Amy Cohen, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a university that seeks to offer varsity teams that will accommodate the athletic interests of qualified men and women equally effectively can be found liable for "discrimination" on the "basis of sex" within the meaning of 20 U.S.C. § 1681(a) of Title IX based on evidence that (1) the percentage of women participating in varsity athletics is lower than the percentage of women in the student body, without regard to the percentage of women in the pool of qualified athletes seeking to participate in varsity sports; and (2) there are some qualified women in the student body who want to play on a viable varsity team that is not being funded as part of the university's athletic program, without regard to the number of similarly situated men.

2. Whether 20 U.S.C. § 1681(b) of Title IX—which provides that "nothing" in Section 1681(a) "shall be interpreted to require" a university "to grant preferential or disparate treatment" on account of an "imbalance" between the gender ratio of a federally supported program and "any community"—prohibits the adoption of standards governing liability that effectively require universities to afford varsity opportunities to qualified women in preference to qualified men in an effort to make the gender ratio of the varsity athletic program conform to the gender ratio of the student body.

3. Whether an interpretation of 20 U.S.C. § 1681 that effectively requires universities receiving federal funds to grant preferential treatment to women athletes in order to redress real or perceived societal discrimination would raise a serious question under the Equal Protection Guarantee of the Constitution by denying similarly situated male athletes an equal opportunity to participate in varsity sports.

PARTIES TO THE PROCEEDING

The petitioners in this case are Brown University, Vartan Gregorian, in his official capacity as President of Brown University, and David Roach, in his official capacity as Athletic Director of Brown University. The respondents are Amy Cohen, Eileen Rocchio, Nicole A. Turgeon, Karen A. McDonald, Melissa Kuroda, Lisa C. Stern, Jennifer Hsu, Jennifer E. Cloud, Darcy Shearer, Jody Budge, and Megan Hull, each individually and on behalf of all others similarly situated.

RULE 29.1 STATEMENT

Petitioner Brown University is a not for profit corporation. It has no parent or subsidiaries. Petitioners Vartan Gregorian and David Roach are individuals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Brown University ("Brown"), Vartan Gregorian, and David Roach (referred to collectively as "Brown") hereby request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the district court's judgment that Brown violated Title IX, and reversing and remanding the district court's remedial relief (App. at 1a), is reported at 101 F.3d 155 (1st Cir. 1996) ("*Cohen* IV"). The opinion and order of the district court finding that Brown violated Title IX (App. at 85a) are reported at 879 F. Supp. 185 (D.R.I. 1995) ("*Cohen* III"). The district court's modified order and opinion (App. at 150a) are not reported. The opinion of the Court of Appeals affirming the district court's entry of a preliminary injunction (App. at 167a) is reported at 991 F.2d 888 (1st Cir. 1993) ("*Cohen* II"). The opinion and order of the district court granting a preliminary injunction (App. at 202a) are reported at 809 F. Supp. 978 (D.R.I. 1992) ("*Cohen* I").

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals (App. at 1a) was entered on November 21, 1996. No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, 34 C.F.R. § 106.41, and the Equal Protection Guarantee of the Fifth Amendment to the United States Constitution. The provisions at issue are set forth in the Appendix at 251-316a.

STATEMENT OF THE CASE

At the time of the trial in this case, the court found that women represented 51% of the student body at Brown University, and had the opportunity to participate on 16 women's varsity teams and two co-ed teams. *Cohen* III, App. at 98a, 96-97a & n.20. Despite this wealth of opportunity for women, the First Circuit held that Brown engaged in sex discrimination prohibited by Title IX, 20 U.S.C. § 1681, because its athletic program—which was designed to accommodate the interests and abilities of *all* athletes—did not produce "gender parity between its student body and its athletic lineup." *Cohen* II, App. at 181a. The First Circuit determined that the statistical difference between the gender composition of Brown's student body and its athletic program supported an inference of discrimination based upon an irrebutable presumption that "women, given the opportunity, will naturally participate in athletics in numbers equal to men." *Id.*, App. at 187a.

The Court accordingly refused to consider overwhelming evidence that Brown's athletic program did not achieve "gender parity" with the student body because women did not represent 51% of the qualified athletes seeking to participate in varsity sports. As a result, the only feasible way that Brown could have complied with Title IX, as interpreted by the First Circuit, would have been to adopt a gender-conscious program, based on a numerical quota, to set aside up to 51% of its varsity positions for qualified women athletes. Had Brown followed that course, and thereby denied male athletes an equal opportunity to participate in varsity sports, it could have entered a "safe harbor" and "stay[ed] on the sunny side of Title IX." *Id.*, App. at 181a. The central issue here is whether a university's refusal to abandon a program based on equal opportunity for all qualified athletes in favor of one based on preferential treatment for women provides a basis for liability under Title IX.

A. The Statutory and Regulatory Framework

Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs or activities receiving federal financial assistance: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Section 1681 also explicitly prohibits the compelled use of preferences to create gender balance in university programs. Section 1681(b) states that "[n]othing" in Section 1681(a) "shall be interpreted to require" any institution "to grant preferential or disparate treatment to the members of one sex on account of an imbalance" between the "percentage of persons of that sex participating in . . . [a] federally supported program" and the "percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C. § 1681(b).[1]

The Department of Health, Education & Welfare ("HEW") issued proposed implementing regulations concerning intercollegiate athletics in 1974.[2] *See* 39 Fed. Reg. 22,228, 22,230 (1974). Two sections of the proposed regulation would have required "affirmative efforts" to "equalize opportunities" for members of both sexes.

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[1] Representative Albert Quie, who introduced the language of Section 1681(b), explained that "this amendment would provide that there shall be no quotas in this sex antidiscrimination title" and that "a similar provision against quotas" is set forth "in section 703(j) of the Civil Rights Act of 1964." 117 Congressional Record 39,248, 39,261-62 (November 4, 1971). Section 1681 does not bar "consideration" of "statistical evidence" of "an imbalance." 20 U.S.C. § 1681(b).

[2] The Education Amendments of 1974 directed the Secretary of HEW to issue regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Javits Amendment, Pub. L. No. 93-380 § 844, 88 Stat. 612 (1974) (codified at 20 U.S.C. § 1681 note). Those regulations would become effective only if not vetoed by Congress and if signed by the President. *See* 20 U.S.C. § 1682.

Id. at 22,230. HEW eliminated those requirements from the final regulation because they "could be considered 'affirmative action,'" which is barred by Section 1681(b). *See* 40 Fed. Reg. 24,128, 24,134 (1975). Instead, the final regulation added a list of ten non-inclusive factors that the Secretary "will consider" to determine "[w]hether equal opportunities are available" for "members of both sexes" in college athletic programs. 34 C.F.R. § 106.41(c) (the "regulation"); 40 Fed. Reg. at 24,134.[3] No part of the regulation encourages or requires statistical balancing of any kind. *Id.*

In 1979, HEW issued a Policy Interpretation that the First Circuit relied upon to establish the legal standard for proving a violation of Title IX. *See* Policy Interpretation, 44 Fed. Reg. 71,413 (1979). The Policy Interpretation establishes a three-part standard to determine "whether the selection of sports and levels of competition effectively accommodate *the interests and abilities of members of both sexes*"—the first of the ten factors set forth in the regulation. 34 C.F.R. § 106.41(c)(1) (emphasis added). Universities will be found in compliance if:

> (1) "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to the respective enrollments"; or
>
> (2) "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest

[3] The ten factors include: "Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; (10) publicity." 34 C.F.R. § 106.41(c). The regulation became effective on July 21, 1975.

> and abilities of the members of [the underrepresented] sex"; or
>
> (3) "it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."

44 Fed. Reg. at 71,418. The Office For Civil Rights for the Department of Education ("OCR"), the agency now responsible for Title IX enforcement, interpreted this policy to mean that institutions are required to "meet the interests and abilities of women *to the same degree* as they meet the interests and abilities of men," and that they are "not requir[ed] . . . to offer . . . intercollegiate participation opportunities" that are "proportional" to the "division by sex of the total student enrollment." OCR Title IX Intercollegiate Athletics Investigator's Manual ("OCR Manual") at 122 (1980) (emphasis added). App. at 291-93a.

During the course of this litigation, OCR changed course, and adopted the First Circuit's interpretation of the three-part standard as its own. *See* "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" dated Jan. 16, 1996 and cover letter from Norma V. Cantu. App. at 294-316a. Under OCR's new interpretation of the first two parts of the standard, a university will be found to offer a nondiscriminatory selection of sports if the ratio of male and female athletes in its varsity program satisfies a numerical test—substantial proportionality with the gender ratio of the student body—or if the program numbers have continually increased towards that benchmark. *Id.*, App. at 305a, 307-09a. A university's failure to meet that numerical test can be excused under the third part of the standard, but only if the university funds all viable sports teams that qualified women in the student body would like to play. *Id.*, App. at 312-14a. *See also* Amicus Brief of the United States at 18, filed in *Cohen* IV, C.A. No. 95-2205 (January 26, 1996) (supporting plaintiffs). Under this interpretation, a university can no longer comply by "meet[ing] the

interests and abilities of women to *the same degree* as they meet the interests and abilities of men." OCR Manual, App. at 292a (emphasis added); Amicus Brief of the United States at 18.

B. Brown's Efforts to Provide Equal Opportunity to Male and Female Athletes

1. Brown University has been a national leader in providing collegiate opportunities for women. At the time of the trial in this case, 51.1% of the student body was female—one of the highest percentages of women in the Ivy League. And Brown was in the forefront of women's athletics with an "impressive history of program expansion" that began shortly after Brown became co-educational in 1971. *See Cohen* III, App. at 140a (emphasis deleted). Brown added 14 funded women's varsity teams to its program between 1971 and 1977, created a women's winter track team in 1982, and today offers many more sports for women than most universities in the United States. *Cohen* I, App. at 204a, 206a; 334a. There is no dispute, however, that the percentage of women participating in Brown's varsity athletic program did not mirror the percentage of women in its student body. The issue in this case is whether that statistical imbalance was the product of "discrimination" prohibited by Title IX. 20 U.S.C. § 1681.

2. The district court did not make any finding that Brown allocated athletic participation opportunities based on an animus towards women, and the record evidence confirmed that Brown attempted to design its sports selection in a way that would give interested men and women an equal chance to participate in varsity athletics. In determining what sports should be offered, Brown evaluated numerous factors, including "the number of high school students available who want to play," and the "interests and abilities of the student body." *See* App. at 334-35a. Under Brown's approach to program development—which did not use a numerical quota or seek to engineer the gender composition of its program—women would only have been likely to secure 51% of the varsity

opportunities if they had represented 51% of the group of interested athletes. They did not.

At trial, Brown presented overwhelming evidence that among prospective and current students interested in varsity athletic participation, men substantially outnumbered women, and the district court made no findings to the contrary. Defendants' expert, Dr. Finis Welch, "a prominent labor economist," *Cohen* III, App. at 125a, concluded that "men express greater interest in, and actually participate in, competitive sports to a much larger degree than do women." App. at 317a. Dr. Welch's conclusion was based on "an extensive search and review of large nationally representative data sources" which included, *inter alia*, a review of seven different surveys conducted by independent institutions concerning young men's and women's interest and participation in sports at the national level, *see id.*, App. at 320-27a, in addition to an extensive review and tabulation of data from the 65,829 applications received by Brown for the classes of 1994-1998 concerning applicants' interest in sports participation at Brown. *See* App. at 318.[4]

Brown's view that the gender ratio of the student body should not be used as a benchmark for equal opportunity in its athletic program can best be illustrated by a hypo-

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[4] Dr. Welch's survey showed that between 38 and 39 percent of the prospective applicants who sent College Board questionnaires to Brown indicating that they planned to participate in varsity sports were women. App. at 320a, 331a, 336a. Similarly, only 42 to 45 percent of the Brown applicants for the classes of 1994-1998 who expressed an interest in participating in sports were women. App. at 319a, 329a. Data from the 1993-94 Athletics Participation Survey by the National Federation of State High School Associations showed that in 1993-94, only 37.9% of participants in high school athletics (the pool from which Brown draws its athletes) were women. App. at 327a, 333a. In addition, the relative participation rate of men to women in the intramural program at Brown is eight to one, even though there is no limit on the number of students who can participate in these programs. App. at 334a. Men have also outnumbered women in Brown's club sports by a margin of three to one. App. at 335-36a.

thetical that demonstrates the effects of such a quota. The hypothetical assumes:

- The ratio of men to women in the student body is 50/50
- There are 160 varsity positions to be allocated
- There are 200 qualified applicants (interested and able athletes)
- 120 of the athletes are men (60%) and 80 are women (40%)

Basis For Allocation	Gender	Athletes Offered A Varsity Position	Dis-appointed Athletes	% Chance for Participation
Student Body Ratio	Men	80 (50% of 160)	40	67%
	Women	80 (50% of 160)	0	100%
Interest and Ability	Men	96 (60% of 160)	24	80%
	Women	64 (40% of 160)	16	80%

As this hypothetical illustrates, each individual, regardless of gender, has an equal chance of participating in varsity athletics if the interests of all qualified athletes are considered when the program is designed.[5] In contrast, an approach that allocates opportunities based on the ratio of the student body—a ratio that has no demonstrable relationship to athletic interest and ability—affords each woman a much higher chance of participation than

[5] An athletic program with single sex teams must take gender into account when opportunities are allocated through the selection of teams. The test of whether the selection mechanism is proper should depend upon whether the program affords men and women an equal chance to participate by responding to the interests of all athletes on a proportional basis. For example, in this hypothetical, if names of all the interested men and women athletes were drawn by lot, and teams were created based upon the lottery results, it is apparent that men would get a higher percentage of the athletic opportunities if more men than women entered the lottery.

each man. In this hypothetical, all interested women are accommodated, while 40 men are not, despite the fact that all the athletes are similarly situated.

3. In May 1991, Brown issued a university-wide directive to implement budget cuts. As part of that effort, Brown changed the status of two men's varsity teams (golf and water polo) and two women's varsity teams (gymnastics and volleyball) by requiring the teams to secure all of their funding from donors. The change affected 37 men and 23 women. *Cohen* I, App. at 206a.

C. Proceedings in the Courts Below

In 1991, members of the women's gymnastics and volleyball teams filed a class action alleging that Brown had discriminated against women athletes in violation of Title IX. The district court and the First Circuit approved the issuance of preliminary and permanent injunctive relief based upon the conclusion that Brown had not complied with the Policy Interpretation's three-part test.

1. After a 14-day evidentiary hearing, the district court granted a preliminary injunction that ordered Brown to restore university funding to the women's gymnastics and volleyball teams, and to continue funding all existing women's teams pending the outcome of the case. *Cohen* I, App. at 248-49a. The court held that a finding of discrimination can be based solely upon an institution's failure to meet the three-part test in the Policy Interpretation, and that plaintiffs were likely to prevail on their claim that Brown failed to meet any part of the test. *Id.*, App. at 227a. Brown appealed pursuant to 28 U.S.C. § 1292(a)(1). The First Circuit affirmed.

The Court of Appeals relied upon the Policy Interpretation to establish the evidentiary standard governing proof of a Title IX violation. *See Cohen* II, App. at 190a. The Court held that the first part of the test—the numerical quota—operates as a "safe harbor." *Id.*, App. at 181a. As a result, any university that "does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Id.* The

First Circuit also construed the second part of the test to use the same quota as a benchmark for compliance. The Court reasoned that institutions could achieve compliance under that part by "continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender" because "Title IX does not require that the university leap to complete gender parity in a single bound." *Id.* With respect to the third part, the First Circuit held that, "[i]f there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." *Id.*, App. at 182a. The Court approved the second and third parts of the test as appropriate "prox[ies] for gender balance." *Id.*, App. at 181a.

The First Circuit rejected Brown's contention that it had not engaged in discrimination by allocating more than 50% of its varsity opportunities to men because men represented substantially more than half of the pool of interested and able athletes. The Court characterized that view as "myopic" because "[t]he fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender." *Id.*, App. at 184a. In addition, the First Circuit asserted that it would be difficult to determine the relative athletic interests of men and women. *Id.*, App. at 185-86a. The Court found it more expedient to adopt an irrebuttable presumption that "women, given the opportunity, will naturally participate in athletics in numbers equal to men." *Id.*, App. at 187a. It accordingly held that Title IX plaintiffs can meet their burden of proving discriminatory conduct through proof of a "numerical disparity, coupled with unmet interest," and that this proof can be rebutted only by evidence that the university continuously and "uninterruptedly" expanded women's athletic participation. *Id.*, App. at 190a, 198a.

Finally, the Court of Appeals concluded that the Policy Interpretation was consistent with Section 1681 because

it "draws its essence from the statute," and does not raise any serious constitutional questions. *Id.*, App. at 184-85a. The Court rejected Brown's argument that the statute could not require universities to accommodate women's athletic interests in preference to men's athletic interests without violating the Equal Protection Guarantee of the Fifth Amendment because "Congress has broad powers . . . to remedy past discrimination." *Id.*, App. at 187a.

2. After the conclusion of a 30-day bench trial in September of 1994, the district court determined that Brown had violated Title IX by failing to fund a sufficient number of sports for women. First, the district court found a "presumption" of discrimination because Brown's program did not satisfy the numerical quota established by the first part of the Policy Interpretation's test. *Cohen* III, App. at 86a, 126a. The district court reasoned that "substantial proportionality is properly found only where the institution's intercollegiate athletic program *mirrors* the student enrollment as closely as possible," in part because Brown "predetermines the . . . male to female ratio" of its athletic program. *Id.*, App. at 118-19a (emphasis added).[6] The court found that Brown's program did not "mirror" its student body at the time of trial based on its findings that 51.14% of the students were women, and 38.13% of the varsity athletes were women.[7] *Id.*, App. at 139a. Second, the court determined that Brown

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[6] The court's finding that Brown "predetermines" the gender ratio did not suggest that Brown had allocated its participation opportunities on the basis of a discriminatory animus. Instead, the court found that Brown's selection of teams and recruitment of the best athletes to play on them effectively determined student body participation ratios. *Cohen* III, App. at 120a.

[7] The district court declined to consider evidence that there were many unfilled participation opportunities on most of the women's teams. *Cohen* III, App. at 97-98a, 121-23a. Brown does not contend that an evaluation of all varsity opportunities would establish a 50/50 allocation between men and women, but the gender differential would have been smaller if the Court had considered all available "opportunities," instead of just participants, as required by 34 C.F.R. § 106.41(c).

could not satisfy part two of the test because "the percentage of women participating in Brown's varsity athletic program has remained remarkably steady" despite "an impressive history of program expansion" shortly after it became coeducational. *Id.*, App. at 140a (emphasis deleted). Finally, the court found that Brown had not satisfied the third part of the test because women on four unfunded teams—fencing, water-polo, skiing, and gymnastics—had "demonstrated the interest and ability" to compete at the varsity level. *Id.*, App. at 141-42a.[8]

The court accordingly found a violation of Title IX without making any findings concerning the gender composition of the pool of interested athletes. The court reiterated the First Circuit's view that Brown's interest-based approach to allocating participation opportunities "undermined the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex." *Cohen* III, App. at 136a. Acknowledging that the concept of the "qualified applicant pool" (i.e., qualified men and women interested in intercollegiate athletics) is well-settled in Title VII jurisprudence, the court claimed that a determination of the interested and qualified pool of potential athletes would be "difficult to administer," and would impose an "insurmountable task for Title IX plaintiffs" because there "is no one measure" of "relative interests." *Id.*, App. at 135-36a.

The court ordered submission of a compliance plan within 120 days. *Id.*, App. at 147a. The district court then rejected Brown's plan and ordered Brown to "elevate and maintain women's gymnastics, women's water-polo, women's skiing, and women's fencing to university-funded

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[8] The district court also stated that Brown violated Title IX by affording women "unequal opportunities" because Brown funded more positions for men than women. *See Cohen* III, App. at 144-45a. Although the court characterized this as an "additional" ground, it is clear that this finding is also based on Brown's failure to meet the quota that is at the heart of this case. *Id.* The First Circuit did not rely on this finding as an alternate basis for affirmance.

status." *Id.*, App. at 163a, 165a.[9] In addition, Brown was enjoined from "eliminating or reducing in status any women's varsity team." *Id.*

3. On appeal pursuant to 28 U.S.C. § 1291, the First Circuit affirmed the district court's finding of liability with Chief Judge Torruella dissenting. (Brown's appeal was not heard by the same panel as the first appeal.) The terms of the district court's remedial order were reversed and remanded.

a. Although the Court considered the legal issues addressed in the preliminary injunction appeal to be law of the case, *Cohen* IV, App. at 4a, it nevertheless reviewed the prior analysis in detail, and confirmed its view that Title IX permits use of "gender parity" as a benchmark for measuring compliance because the focus of the statute is "not on the overrepresented gender, but on the underrepresented gender." *Id.*, App. at 33a. The Court again found that the concept of the qualified pool "has no place in a Title IX analysis of equal opportunities for male and female athletes," because this approach would "undermine[] the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interest[]." *Id.*, App. at 30a, 37a. The Court emphasized that "even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than for men" because it assumed that women's lower level of interest in athletics is itself the product of "women's historical lack of opportunities to participate in sports." *Id.*, App. at 42a, 40a.

The First Circuit reversed the terms of the district court's remedial order based on considerations of academic freedom. *Id.*, App. at 59-60a. The district court exceeded its discretion in that respect by requiring Brown

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[9] Thus, the court ordered Brown to fund all viable varsity women's teams while numerous viable varsity men's teams remained unfunded. *See Cohen* III, App. at 138a n.52, 96a.

to fund additional teams instead of permitting it to pursue the "statutorily permissible proposal to comply . . . by cutting men's teams." *Id.*, App. at 54a.[10]

b. Chief Judge Torruella dissented. The dissent read Section 1681(b) to prohibit rules that require universities to afford interested women opportunities in preference to similarly-situated men in order to establish compliance with Title IX. *Id.*, App. at 75a, 80a. The Chief Judge concluded that "the three prong test," as the prior opinions interpreted it, did not represent a permissible interpretation of § 1681 because that test establishes "a quota" under all three parts. *Id.*, App. at 76a. The dissent explained that "[the first] prong surely requires statistical balancing" and "[i]t can hardly be denied that [the second] prong requires statistical balancing as it is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong." *Id.*, App. at 78a. And the third prong did not change the nature of the test because "a quota with an exception for situations in which there are insufficient interested students to allow the school to meet it remains a quota." *Id.*, App. at 79a.

The dissent agreed with Brown's contention that the relative interests of men and women had to be evaluated in assessing issues of discrimination and equal opportunity. Otherwise, where "the rate of interest in athletics diverges between men and women at any institution, the district court's interpretation would require the institution to treat an individual male student's athletic interest and an individual female student's athletic interest completely differently: one student's reasonable interest would have to be met, *by law*, while meeting the other student's interest would only aggravate the lack of proportionality giving rise to the legal duty." *Id.*, App. at 77a. The dissent concluded that Section 1681 did not "require[]

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[10] The Court remanded the case for further proceedings on the remedy. Those proceedings have no bearing on the issues presented here, however, because Brown only seeks review of the lower courts' interpretation of the standards governing liability under Title IX, and liability has been finally resolved by the First Circuit.

Brown to allocate its athletic resources to meet the as-yet-unmet interest of a member of the underrepresented sex, women in this case, while simultaneously neglecting any unmet interest among individuals of the overrepresented sex." *Id.* Chief Judge Torruella found that his interpretation of Section 1681 was further required by the "serious constitutional difficulties" raised by the majority's interpretation. *Id.*, App. at 81a. He underscored the fact that there had been absolutely no findings by Congress with respect to discrimination against women in athletics when Title IX was passed, and no "exceedingly persuasive justification" for preferences had been advanced. *Id.*, App. at 80a.

REASONS FOR GRANTING THE WRIT

Title IX, like the constitutional guarantee of equal protection, embodies the "widely cherished American ethic" of "[f]airness in individual competition for opportunities." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 319 (1978) (opinion of Powell, J.) (construing Title VI and the Equal Protection Clause). Brown's athletic program, which provides all interested and able athletes, whether male or female, an equal chance to secure a place in its varsity program honors that ethic. The First Circuit nevertheless held that Brown violated Title IX through adherence to these gender-neutral principles because its program did not achieve "gender parity between its student body and its athletic lineup," *Cohen* II, App. at 181a, did not "march uninterruptedly" towards that goal, *id.*, App. at 198a, and did not fund positions for every qualified woman in the student body interested in competing on a viable team. *Id.*, App. at 182a.

Under the First Circuit's interpretation of Title IX, Brown had no choice but to set aside up to 51% of its varsity opportunities for qualified women because 51% of its students were women. That stark numerical quota was required without regard to the fact that women do not represent 51% of all interested athletes, because any differences in the athletic interests of men and women were deemed attributable to "socialization and disparate

opportunities." *Id.*, App. at 187a. Following the First Circuit's lead, the other circuits to consider the issue have similarly concluded that Title IX *requires* colleges to assign coveted athletic opportunities to qualified women on this same preferential basis.[11]

This Court should grant review of the First Circuit's decision for two reasons. First, the decision of the Court of Appeals conflicts with this Court's precedents. The First Circuit committed virtually every error that this Court has warned against when interpreting the same statutory wording at issue here in the context of Title VII. The Court of Appeals allowed an inference of discrimination based on a statistical comparison with the student body, instead of the qualified pool of athletes seeking to play varsity sports. It refused to consider evidence that the statistical disparity it found was the product of differences in men's and women's relative interest in sports, for which Brown has no legal responsibility. It adopted a "safe harbor" that encourages universities to adopt numerical quotas and set aside policies to "stay on the sunny side of Title IX." *Cohen* II, App. at 181a. It adopted evidentiary standards governing proof of liability that compel universities to institute mandatory quotas and other preferential treatment expressly forbidden by Section 1681(b). And it read the Equal Protection Guaran-

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[11] *Roberts v. Colorado State Univ.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993) (agreeing with *Cohen* II that women's lower level of interest in sports participation is not relevant to proof of discrimination); *Horner v. Kentucky High School Athletics Ass'n*, 43 F.3d 265, 275 n.9 (6th Cir. 1994) (citing *Cohen* II with approval and holding that "an institution [cannot] allocate athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men"); *Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332, 343-44 (3d Cir. 1993) ("schools must either provide athletic opportunities in proportion to gender composition of student body or fully accommodate interested athletes among under-represented sex"). *See also Kelley v. Bd. of Trustees of the Univ. of Illinois*, 35 F.2d 265, 270 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) (citing *Cohen* interpretation as a justification for voluntary preferences for treatment of women athletes).

tee of the Constitution to be unconcerned about the fact that universities will have to deny male athletes an equal chance to participate in varsity sports based on the unsupported assumption that Congress found that quotas and set asides were needed to redress societal discrimination against women.

Second, the use of Title IX to mandate adherence to preferential quotas presents an issue of exceptional importance that warrants resolution now. Most of the varsity athletic programs in the country must be dramatically altered to increase the percentage of women in order to comply with the standard at issue here. Universities with budgetary constraints must cut academic offerings to fund additional teams for women, cut teams for men, or risk liability for damages and loss of federal funds. In light of the uniform position of the circuits and the federal agency responsible for enforcement, intervention by this Court is needed to prevent compulsory displacement of nondiscriminatory programs that offer equal opportunity to all students with preferential programs that guarantee "gender parity." *Id.*

I. THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The First Circuit Disregarded This Court's Holdings That An Inference Of Discrimination Can Only Be Predicated On A Statistical Comparison With A Pool Of Interested And Qualified Candidates

Title IX prohibits "discrimination" against students, whether male or female, "on the basis of sex." 20 U.S.C. § 1681(a). In this case, the lower courts found that Brown engaged in unlawful "discrimination" based on a presumption derived from statistical proof that the percentage of women in its student body exceeded the percentage of women in its athletic program. One would think that Brown's tremendous success in attracting women to its student body would suggest the absence of discriminatory policies. But here, that was the very evidence that was used to supply "proof" that Brown's athletic program

was discriminatory.[12] And the Court refused to consider overwhelming evidence indicating that the disparity was attributable to the fact that there are many fewer women than men who want to participate in varsity athletics, finding that such evidence was "irrelevant" and ridiculing Brown's view of its relevance to proof of discrimination as "myopic." *Cohen II*, App. at 184a. Even if Brown could fill 51% of its athletic program with qualified women, by preferring interested women over interested men, gender-blind policies would not produce that result in the real world where men and women—for a variety of reasons unrelated to Brown's conduct—do not share an equal interest in varsity competition. *See supra* at 7-8. There was accordingly no basis whatsoever to support a finding of "discrimination," 20 U.S.C. § 1681(a), or a denial of "equal opportunity," 34 C.F.R. § 106.41(c), based on the statistical proof used by the courts below.[13]

The First Circuit's reliance on this statistical evidence to establish proof of discrimination is irreconcilable with this Court's decision in *Wards Cove v. Atonio*, 490 U.S. 642 (1989). Title VII prohibits "discrimination," like

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[12] The First Circuit ignored Brown's contention that Title IX required proof of discriminatory intent. Brief of Appellants dated December 11, 1995, refiled March 5, 1996. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 n.8 (1992), this Court held that proof of intent is required for damage claims under Title IX, but did not resolve the question whether such proof is also required for claims seeking equitable relief. If this Court were to grant review, Brown would present that issue, which was properly preserved below, as an additional ground for reversal.

[13] The First Circuit's test conflicts with the text of the regulation, which emphasizes the need to consider whether the university's program "effectively accommodate[s] the *interests and abilities of members of both sexes.*" 34 C.F.R. § 106.41(c)(1) (emphasis added). The language of the Policy Interpretation also did not require the course chosen by the lower courts. To the extent it did, however, it would not be entitled to any deference. *See, e.g., Stinson v. United States*, 503 U.S. 36, 45 (1993) (deference not required where the interpretation is inconsistent with the statute, the Constitution, or a regulation).

Title IX, "on the basis of sex." 42 U.S.C. § 2000e-2(a). In *Wards Cove*, the court of appeals upheld a finding of "discrimination" under Title VII based upon evidence that the percentage of non-white workers filling unskilled positions in an employer's cannery operations was substantially higher than the percentage of non-white workers filling unskilled positions in the employer's non-cannery operations. *Id.* at 649-50. This Court reversed, finding that the Court of Appeals "fundamentally misconceived the role of statistics," because the statistical imbalance identified by the court of appeals could have been attributable to differing levels of interest between the groups instead of discriminatory barriers. *Id.* at 650 & n.5, 654.

This Court explained that statistical proof of discrimination in an employer's workforce must be based on a comparison with the racial composition of the pool of qualified *applicants*—those individuals who are willing and able to compete for the opportunities at issue. *Id.* at 652-54.[14] The "pool of cannery workers" could not be used as a "surrogate for the class of qualified job applicants" because "it contains many persons who have not (and would not) be noncannery job applicants." *Id.* at 654. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (emphasizing that an "inference of discriminatory exclusion" can only be made where there is "a significant statistical disparity" between the "number of qualified minority contractors *willing and able* to perform a particular service and the number of such contractors actually engaged [in that service]") (emphasis added). This Court emphasized in *Wards Cove* that a "selection mechanism" that awarded opportunities to nonwhite employees proportional to their interest in those

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[14] The Civil Rights Act of 1991 altered certain terms of Title VII after *Wards Cove* that are not relevant here. Congress made no changes to *Wards Cove's* reliance on a qualified pool for disparate impact analysis under Title VII. *See* H.R. Report No. 102-40(1), 102nd Congress, 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 571.

opportunities was probably *not* discriminatory. 490 U.S. at 653.

The First Circuit, however, did not follow this Court's clear guidance, and committed precisely the same error as the court of appeals in *Wards Cove*. The First Circuit insisted that the relevant population for comparative purposes was the entire student body, even though this group unquestionably "contains many persons who have not (and would not) be . . . applicants" for varsity opportunities. *Wards Cove*, 490 U.S. at 654. By adherence to this analysis, the court impermissibly used a gender "imbalance" in one "segment" of the university's programs to establish a presumption of discrimination. *Id.* at 653. And it further compounded its error by refusing to permit Brown to rebut that presumption through evidence which established that the gender ratio of "selected applicants" for Brown's athletic program "is not significantly less" than the gender ratio of "qualified applicants"—the very evidence that this Court said was strongly probative of a nondiscriminatory "selection mechanism." *Id.* at 653. There was accordingly no basis for the First Circuit's conclusion that an "empirical[] demonstrat[ion] that . . . women have less interest in sports" could not "justify providing fewer athletics opportunities for women than for men," because that is the natural and permissible result of equal opportunity as defined by this Court in *Wards Cove*. *Cohen* IV, App. at 42a.

B. The First Circuit's Conclusion That Section 1681 Obligates Universities To Afford Preferential Treatment To Women Conflicts With This Court's Interpretation Of The Same Language In Title VII

In Title IX, Congress directed universities receiving federal funds to eliminate "discrimination" in their programs, but it did not direct them to achieve gender balance in those programs, or to ensure that interested women would have a greater chance of participating in varsity athletics than interested men. Section 1681(b) could not be more explicit on this issue, as it tells courts that "*noth-*

ing" in the language of Section 1681(a) "shall be interpreted" to "require" any institution to "grant preferential or disparate treatment to the members of one sex" to rectify "an imbalance." 20 U.S.C. § 1681(b) (emphasis added). The evidentiary standards adopted by the First Circuit, however, conflict with the clear command of that language and this Court's Title VII precedents.

First, the Court of Appeals read this language to permit the use of a quota as a "safe harbor" that would prevent imposition of liability. *Cohen* II, App. at 181a. The Court emphasized that this rule afforded universities an easy way to "stay on the sunny side of Title IX" because they could simply implement a quota that achieves "gender parity" with its student body. *Id.* This Court, however, has already read the same language in Section 703(j) of Title VII, 42 U.S.C. 2000e-2(j), to prohibit the adoption of evidentiary standards that encourage defendants to institute quotas on a voluntary basis.[15] *Wards Cove*, 490 U.S. at 652 (rejecting reliance on statistical proof that would make quotas the only "practicable option" for defendants). *See also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993-94 (1988) (plurality opinion) (adoption of legal rules that encourage the use of quotas to avoid expensive litigation would be "contrary to Congress' clearly expressed intent" in Section 703(j)).

Second, the First Circuit's rule does not merely encourage the imposition of preferential quotas, as Chief Judge Torruella persuasively explained, it requires it. *Cohen* IV, App. at 78-79a. Compelling Brown to reserve up to 51% of its athletic opportunities for some 40% of the pool of qualified candidates—the goal Brown must ultimately meet to escape liability under the First Circuit's interpretation—is surely "preferential . . . treatment" to eliminate an "imbalance" within the ordinary meaning of Section 1681(b). *See, e.g., Wards Cove*, 490 U.S. at 653 (an evidentiary standard that infers discrimination based on

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[15] As set forth in n.1 *supra*, Section 1681(b) was patterned after Section 703(j) of Title VII.

a statistical comparison with a pool that includes persons who are not interested in the opportunities leads to preferential treatment); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (evidentiary rule that presumes discrimination when an employer hires a male instead of an equally qualified female compels preferential treatment barred by Section 703(j)). *See also Croson*, 488 U.S. at 493 (a set aside "denies certain citizens the opportunity to compete for a fixed percentage").[16] Yet this Court has repeatedly and emphatically confirmed, when construing the same words in Section 703(j) of Title VII, that Congress "strongly opposed" the use of "quotas or preferences" to "maintain [gender] balance," and that the failure to make decisions with reference to such measures does not provide a basis for liability. *Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 463 (1986) (Title VII does not "require an employer . . . to adopt quotas or preferences simply because of a racial imbalance"); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340, 375 n.60 (1977) (Section 703(j) "makes clear that Title VII imposes no requirement that a work force mirror the general population" and "does not require an employer to grant preferential treatment" to "rectify an imbalance"); *Burdine*, 450 U.S. at 259 (Section 703(j) demonstrates that Title VII does not "demand that an employer give preferential treatment to minorities or women").

The First Circuit was required to follow those precedents here. *See, e.g., Oscar Mayer & Co. v. Evans*, 441

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[16] The First Circuit asserts that its rule does not establish an impermissible "quota" because a university would not be liable if the number of qualified women athletes in the student body is insufficient to attain "gender parity." *Cohen II*, App. at 181a. A similar argument was rejected in *Bakke* because a program that *reserves* a number of positions for any qualified candidates on the basis of race denies equal opportunity, whether called a quota or some other name. 438 U.S. at 289 (Opinion of Powell, J.). In addition, universities cannot avoid preferential treatment by accommodating the interests of all male and female athletes, because few, if any, universities have the funds or facilities to do that.

U.S. 750, 754, 756 (1979) (relying on Title VII precedent to construe section of ADEA that was "patterned after and is virtually in *haec verba*" with section of Title VII). It nevertheless sought to justify a divergent interpretation of Section 1681 because gender has to be taken into account when creating single sex teams, and courts "must have some way of determining whether an institution complies with the mandate of Title IX." *Cohen* IV, App. at 38a. But Congress obviously did not countenance the imposition of mandatory quotas or other preferences "as a way of determining" whether universities were discriminating, and it did not exclude athletics from the dictates of Section 1681(b). In addition, the central inquiry in ferreting out discrimination should not be whether gender was considered—as here there is a legitimate reason to do so—but whether "legitimate . . . principles were subordinated to [gender]" when the operative decisions were made. *Cf. Bush v. Vera,* 116 S. Ct. 1941, 1951 (1996) (plurality opinion). Under the First Circuit's rule, however, efforts to accommodate the interests of all members of the qualified pool—a "legitimate principle" of program design—must be "subordinated to [gender]" in an effort to reach an arbitrary quota. *Id.*

In the end, the Court of Appeals seeks to justify its rule based upon the view that women's relative lack of interest in sports should not "become the instrument of further discrimination against the underrepresented gender." *Cohen IV,* App. at 42a. But there is no evidence whatsoever that Congress determined that preferences are needed to eliminate barriers to equal opportunity, and the text of the Act leaves no doubt that Congress decided not to mandate such a remedy. Women's participation in athletics has increased dramatically without the First Circuit's rule, and the fact that women are not equally interested in devoting their time and energies to collegiate athletics may be the product of legitimate choice instead of discriminatory barriers. *See, e.g., Croson,* 488 U.S. at 503 (finding that the "dearth of minority participation"

in the construction industry could be explained by "past societal discrimination" as well as "entrepreneurial choices"). Just as there is no reason to presume that men would enroll in collegiate dance programs in equal numbers to women in the absence of discriminatory barriers, there is no reason to presume an equal interest in athletics when the evidence shows otherwise. Title IX was designed to guarantee equal opportunity—not equal participation—and the First Circuit's failure to follow the dictates of Section 1681(b) and this Court's precedents warrants review by this Court.

C. The First Circuit's Conclusion That Congress Could Permissibly Require Universities To Establish Quotas To Remedy Perceived Societal Discrimination Against Women Conflicts With This Court's Precedents Interpreting The Equal Protection Guarantee Of The Constitution

As this Court has frequently held, federal courts must interpret statutes in a manner that avoids serious constitutional questions. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). In clear disregard of that principle, the First Circuit chose an interpretation of Section 1681 that presents serious constitutional questions under circumstances where the plain meaning of that section poses no constitutional problems whatsoever. In addition, the First Circuit's conclusion that Congress could constitutionally require universities to apportion athletic opportunities based upon a "gender classification slanted . . . in favor of women" because it has "broad powers under the Fifth Amendment to remedy past discrimination" conflicts with this Court's precedents. *Cohen* II, App. at 187a.[17]

The First Circuit failed to adhere to the standard established by this Court in *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718 (1982). *See also United States*

[17] This Court reserved the question whether Congress in fact relied upon its powers to remedy past discrimination in enacting Title IX. *See Franklin,* 503 U.S. at 75 n.8.

v. Virginia, 116 S. Ct. 2264 (1996). In *Hogan*, this Court held that Mississippi violated the Equal Protection Clause of the Constitution because a "searching analysis" revealed no "exceedingly persuasive justification" for an admissions policy that denied men the opportunity to compete for admission to a state nursing school. 458 U.S. at 724, 728. In this case, the Court did not conduct a "searching inquiry" to determine whether Congress had made any findings of past discrimination that would supply an exceedingly persuasive justification for the imposition of mandatory quotas or set asides that deny male athletes an equal opportunity to participate in collegiate sports. *Id.* at 728. Instead, the First Circuit thought it sufficient that "much testimony was heard with respect to discrimination against women in higher education" prior to the passage of Title IX. *Cohen* II, App. at 188a (quoting H.R. Rep. No. 554, 92nd Cong., 2nd Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511). That does not constitute an "exceedingly persuasive justification" under this Court's precedents.

First, this Court emphasized in *Hogan* that a "compensatory purpose" is not sufficient to "justify an otherwise discriminatory classification" unless "members of the gender benefited by the classification actually suffer a disadvantage related to the classification." 458 U.S. at 728. That standard was not satisfied in *Hogan* because the women who received the benefits of the classification—those who obtained admission to nursing school in preference to men—had not been "deprived of . . . opportunities" to "obtain training in the field of nursing." *Id.* at 729. Similarly, in *Orr v. Orr*, 440 U.S. 268 (1979), this Court found that a state law that denied alimony to men could not be upheld as a remedy for economic discrimination against women, because the beneficiaries included women who had achieved financial success despite societal discrimination. *Id.* at 282-83. As in *Hogan*, this Court found that "a gender-based classification which . . . generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Id.*

The classification at issue fails for the same reason. The Court of Appeals asserted that societal discrimination had dampened women's interest in athletics. *See Cohen* II, App. at 187a. But the direct beneficiaries of the preference it divined from Section 1681 are women who already have the interest, ability, and training necessary to compete in varsity sports at the collegiate level. *Cohen* III, App. at 138a n.52; 163a; 165a (limiting relief to those women with demonstrated ability to compete at the varsity level). These women, like the women who stood to benefit in *Orr*, managed to become accomplished athletes despite any societal discrimination, and there is accordingly no "exceedingly persuasive justification" to afford them an opportunity to compete in varsity athletics in preference to similarly situated men.[18]

Second, this Court has declined to interpret the Equal Protection Clause in a manner that "denies certain citizens the opportunity to compete" for the full universe of opportunities provided by a program based on a "generalized assertion that there has been past discrimination" in society that may have contributed to a statistical imbalance. *See Croson*, 488 U.S. at 493, 498. *See also Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274 (1986) (reversing decision upholding a layoff policy that gave minorities a preference to "alleviate the effects of societal discrimination"); *Bakke*, 438 U.S. at 307. As this Court found in *Croson*, there is no compelling interest for "apportioning . . . opportunities on the basis of race"

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[18] In contrast, the benefits bestowed on women in *Califano v. Webster*, 430 U.S. 313, 318 (1977), one of the two cases relied upon by the First Circuit, *see Cohen* II, App. at 187a, worked "directly to remedy" economic discrimination that had been suffered by the beneficiaries throughout their working career by affording them a more favorable basis for calculating retirement income at the end of their career. The First Circuit's reliance on *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990), also does not support its conclusion because the minority preferences at issue there were designed to serve the interests of listeners by promoting viewpoint diversity in programming and not to "remedy past discrimination." *See Cohen* II, App. at 187a.

because "race should be irrelevant to personal opportunity and achievement," and it would contravene the purposes of a "constitutional provision whose central command is equality" to give "shifting preferences based on inherently unmeasurable claims of past wrongs." 488 U.S. at 505-06.

Gender classifications do not have to be supported by a "compelling interest." *Id.* But this Court's precedents leave no room for doubt that there is no "exceedingly persuasive justification," *Hogan*, 458 U.S. at 724, for compelling universities to "apportion[] [athletic] opportunities on the basis of [gender]" to redress "inherently unmeasureable claims of past wrongs." *Croson*, 488 U.S. at 505-06. *See also Johnson v. Transp. Agency*, 480 U.S. 616, 638, 630 n.8 (1987) (upholding a public employer's decision to rectify an extreme gender imbalance through voluntary hiring preferences because, *inter alia*, gender was just "one of numerous factors [taken] into account" and there is a "fundamental difference between volitional private behavior and the exercise of coercion by the State").

II. THE PETITION PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE THAT WARRANT RESOLUTION BY THE COURT AT THIS TIME

A. Compliance With The Affirmative Action Obligations Imposed By The Prevailing Interpretation Of Title IX Will Have A Profound And Detrimental Impact On Programs At Virtually Every University In America

This case does not concern the Title IX problems of one university in Rhode Island. The issues presented here have wide-ranging impact on countless colleges across America. As the First Circuit acknowledged, it is "unlikely" that many athletic programs at coeducational universities "reflect the gender balance of their student bodies." *Cohen* II, App. at 182a. *See also infra* at n.19. Virtually every institution in the country must now do what Brown has been ordered to do: find the funds neces-

sary to continue expanding women's teams, or eliminate opportunities for men. Failure to restructure athletic programs in an effort to achieve gender parity exposes virtually all academic institutions to expensive litigation, liability, and the loss of federal funding.

Nor does this case simply concern unwarranted regulatory intrusion into the affairs of academic institutions. The rule of law that has been imposed also undermines the congressional intent to protect the "overrepresented" gender from the competitive consequences of mandatory preferences. As stated by the plurality in *Watson*, it is "perverse" to have "quotas and preferential treatment become the only . . . means of avoiding expensive litigation and potentially catastrophic liability" when Congress "clearly and emphatically expressed its intent" to prohibit compelled preferences. 487 U.S. at 993.

There is also no need to speculate whether this rule will have that impact. The press has already been filled with reports of colleges and universities cutting men's varsity programs to meet the requirements of this misguided interpretation of Title IX. As one article reported last year, UCLA discontinued its men's swimming and diving team, which had produced 22 Olympic medalists, including 13 golds. *See* Jessica Gavora, *Quota System Hurts Team*, USA Today, July 23, 1996, at 14A.[19] Universities

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[19] *See also* Mary Jordan, *Only One School Meets Gender Equity Goal*, The Washington Post, June 21, 1992 at D1; David Barron, The Houston Chron., June 29, 1993, at 1 (men's basketball program eliminated to make way for women's softball); Billy Packer, *Quota System Would Benefit Women, Hurt Black Male Athletes*, USA Today, July 2, 1993, at 12C; Bill Jauss, *NU Adds Varsity Women's Soccer; Men's Fencing Clubbed*, Chicago Trib., Aug. 9, 1993, at 11; Sean Waters, L.A. Times, June 2, 1994, at 22 (Santa Monica College dropped men's volleyball and tennis teams and added women's soccer); Michael Mayo, Ft. Lauderdale Sun-Sentinel, Dec. 11, 1994, at 16C (Pro golfer Woody Austin played golf at the University of Miami before the men's program was cut); John Maher, *Out of the Running*, Austin American-Statesman, Jan. 22, 1995, at A1 (Blinn

that dismantle men's athletic programs to comply with the standards at issue cannot simply turn back the clock when those standards are later found to conflict with Title IX. It takes years to build a successful program, and those programs should not be sacrificed to the impermissible affirmative action mandate of the lower courts.

B. This Court Should Not Postpone Review Pending Further Consideration By The Courts Of Appeals

Many circuits have not had an opportunity to consider the questions at issue in this case. Under the circumstances presented, however, there is no reason for this Court to await further review by the lower courts.[20] First, there is essentially no prospect that the erroneous rule of law adopted by the First Circuit will be abandoned without intervention by this Court. Even if another circuit decides the issue correctly, there is no reason to believe that the First Circuit would change the views it reached in two voluminous opinions after full briefing of the issues. In addition, OCR's decision to adopt and enforce the views of the *Cohen* courts in its Clarification Memo-

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College dropped world-renowned men's track program which produced 11 Olympians and a gold medal winner at the 1992 games); Wendy Parker, *Non-Revenue Sports—Quickest Way to Comply? Just Ax the Men's Teams*, The Atlanta Jrnl. and Constitution, May 7, 1995, at 9E (Univ. of Pittsburgh to drop men's gymnastics and tennis and add women's soccer to improve its numbers . . . at least 14 college wrestling programs have been cut just this year); Camille Paglia, *"Men's Sports Vanishing [as] Schools Drop Programs to Meet Equity for Women,"* USA Today, April 9, 1996, at 11A (over 100 men's wrestling programs have been terminated; men's gymnastics has been virtually annihilated).

[20] This Court has previously exercised its discretion to review analogous issues of exceptional importance to universities, and the public at large, even in the apparent absence of a conflict in the lower courts. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (availability of implied right of action under Title IX); *Hogan*, 458 U.S. at 718 (constitutionality of an admissions preference favoring women).

randum of last year further diminishes the prospect that the courts of appeals will eventually abandon the *Cohen* interpretation.

Second, it is unlikely that future cases would present a better record for consideration of these important questions. Brown submitted extensive evidence concerning the allocation of athletic opportunities, and preserved the legal arguments appropriate for this Court's consideration. Both sides of the issues were examined thoroughly in the two *Cohen* opinions and the dissent of Chief Judge Torruella. If this Court denies review here, there is in fact a risk that other universities may be reluctant to litigate the issues in light of the expense, the precedential force of the *Cohen* opinions, and the threat of enforcement actions posed by the OCR interpretation. There is accordingly no benefit to postponing review now.[21] And the harm caused by permitting the lower courts' distortion of Title IX to stand is both substantial and irreparable.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted.

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[21] This Court's decision to deny certiorari in *Roberts*, 510 U.S. at 1004, does not suggest that the same course is appropriate here. The petition in *Roberts* only presented the question whether proof of intentional discrimination is required under Title IX, and did not seek review of the court of appeal's interpretation of § 1681(b) or the Equal Protection Guarantee of the Constitution. *See* Petition for Writ of Certiorari, No. 93-559 at i. The *Roberts* decision also relied upon *Cohen* II, which was issued in the context of a preliminary injunction, and could have been revisited at the conclusion of the case. Finally, the United States did not appear as an amicus in *Roberts*, and did not adopt its Clarification Memorandum endorsing the *Cohen* II view until 1996. The decision in *Kelley v. Bd. of Trustees of the Univ. of Illinois*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995), concerned a challenge to a university's voluntary decision to eliminate the men's swimming program, and accordingly did not present the question whether preferences can be mandated under Section 1681.

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